BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	

To: The Commission

COMMENTS OF REED SMITH SHAW & MCCLAY

Reed Smith Shaw & McClay ("Reed Smith") hereby submits its comments on the Notice of Proposed Rulemaking, FCC 93-454, released October 8, 1993 (hereinafter "Notice") in the above-captioned proceeding.

The purpose of this proceeding is to implement by rulemaking Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, which amends Sections 3(n) and 332 of the Communications Act of 1934, 47 U.S.C. §§ 153(n) and 332, in order to create a comprehensive new framework for the regulation of mobile radio services.

Reed Smith is a law firm which in the past has represented, and currently represents clients that are not believed to offer mobile radio services to the public. On behalf of such clients, Reed Smith here comments on the amended Section 332, specifically

subsection (d) insofar as paragraph (1) of that subsection defines the term "commercial mobile service" and paragraph (3) of that subsection defines the term "private mobile service."

I. THE STATUTE DEFINES "COMMERCIAL MOBILE SERVICE" SO AS TO EXCLUDE SERVICE PROVIDED TO A LIMITED CLASS OF ELIGIBLE USERS, SUCH AS USERS IN A SINGLE INDUSTRY.

Paragraph (1) of subsection (d) of the revised statute states that for purposes of Section 332,

> (1) the term "commercial mobile service" means any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.

The Notice seeks to further define several parts of the above-quoted definition.[1] Reed Smith here offers its comments on the element of the definition that requires that a commercial mobile service be available to the public or to "such classes of eligible users as to be effectively available to a substantial portion of the public."[2]

Reed Smith supports the Commission's suggestion that "many private land mobile services targeted to specific businesses, industries, or user groups (e.g., utilities, railroads, taxi companies) are arguably not intended for use by the public or even

---

1 *Notice* at ¶¶ 10-27.

2 *Notice* at ¶¶ 23-27.

a 'substantial portion' of the public."[3] The use in the statute of the word "classes" rather than "class" when referring to eligible users conveys a significant limitation on the meaning of "substantial portion of the public." The term "commercial mobile service" is defined by the statute as a single mobile service ("any mobile service") that is provided for profit and which makes interconnected service available to the public generally or to more than one class ("classes") of users constituting "a substantial portion of the public." Thus, the Commission should follow its suggestion and decide that a mobile service the eligible users of which are limited to one class, such as a single industry, is not "effectively available to a substantial portion of the public." Consequently, that mobile service is not a commercial mobile service.

This interpretation is consistent with the Commission's reference to the Conference Report concerning the deletion of "the word 'broad' before 'classes of users'[4] in order to ensure that the definition of 'commercial mobile services' encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public." The key word is "classes", twice stated in the plural. Certainly it is possible that, in the aggregate, narrow

---

3 *Notice* at ¶ 25. Other examples of specifically defined classes of "eligible users" include services dedicated to manufacturers, and the land transportation industry. See *Notice* at ¶ 38, and fn. 52.

4 See *Notice* at ¶ 25 and H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess. (1993) (the "Conference Report") at p. 496.

as well as broad "classes" of users could constitute a substantial portion of the public, and that fact makes understandable the Conference Committee's deletion of the word "broad" before "classes."

The approach suggested by the Commission should not be read to permit disregard of user eligibility limitations and treatment of a vague "large sector" of the public as meeting the "effectively available" definition.[5] This would be contrary to the wording of the statute, which includes the "classes of eligible users" as a requisite element. Moreover, the Commission was there only making the non-controversial point that services could be "effectively available" to a "substantial portion of the public" "even though they are not offered to the general public without restriction, i.e., they include some eligibility restrictions." Indeed, the example of a "large sector" given in the last sentence of paragraph 24 of the Notice also meets the "classes of eligible users" requirement, in that the Specialized Mobile Radio and private carrier paging eligibility rules are described as making eligible "all persons except foreign governments and their representatives." The Commission observed that such a broad user eligibility "appear[s] to impose virtually no practical limit on the public availability of the service."[6]

Therefore, if a mobile service provides interconnected service to a limited class of eligible users, such as a single

---

5 *Notice* at ¶ 24.

6 *Notice* at ¶ 24.

industry group, that service is not a commercial mobile service. The Commission may further narrow the definition of commercial mobile service by reference to system capacity[7] and service area size and location,[8] but those factors could not be used to expand the definition of commercial mobile service, unless those factors were to serve to resolve close cases in defining what is a "class" or "classes" of eligible users.

Finally, Reed Smith disputes the analysis of the Commission implicit in its discussion of the regulatory treatment of mobile-satellite services.[9] Here the Commission suggests that those entities that resell the services of a commercial mobile service should also be classified as commercial mobile services without regard to whether such entity satisfies any of the criteria set forth in the definition of "commercial mobile service." Since, a reseller of mobile-satellite services may offer its services to a narrow class of users, and therefore not to a substantial portion of the public, such analysis is faulty under section 332(d) and clearly conflicts with the intention of the statute. Resellers of other services may similarly offer services to a class of eligible users, and should not be classified as commercial mobile service providers based solely on the underlying carrier's status.

---

7 *Notice* at ¶ 26.

8 *Notice* at ¶ 27.

9 *Notice* at ¶ 43.

II. THE STATUTE DEFINES "PRIVATE MOBILE SERVICE" SO AS TO INCLUDE EVERY SERVICE THAT IS EITHER NOT A COMMERCIAL MOBILE SERVICE OR NOT THE FUNCTIONAL EQUIVALENT OF A COMMERCIAL MOBILE SERVICE.

The Commission should interpret the definition of "private mobile service" in its intended literal manner. A mobile service that falls within the definition of a commercial mobile service should nonetheless be classified as a private mobile service if the Commission determines that it is not the functional equivalent of a commercial mobile service. Similarly, a mobile service that might be determined to be functionally equivalent to a commercial mobile service is nonetheless a private mobile service if it does not meet the definition of a commercial mobile service. The language of the statute and its legislative history require such an interpretation.

Paragraph (3) of Section 332(d) states that for purposes of the section,

> (3) the term "private mobile service" means any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

The "not" and "or" wording of the statute is precise: if a mobile service is not a commercial mobile service, or if the mobile service is not the functional equivalent of a commercial mobile service, the mobile service is a private mobile service. The word "or" in the statute would have to be "and" if a private mobile service had to "not" be both a commercial mobile service and the functional equivalent of one.

As the Commission notes, the definition of "private mobile service" did not take its final form until the Conference on the Senate and House bills, where the concept of functional equivalence was added to the definition. The Commission states that the language of the Conference Report regarding the statutory definition is subject to two possible interpretations.[10] Reed Smith submits that the better interpretation of what the Conference Report says about the definition of "private mobile service" is the first interpretation proposed by the Commission.[11]

The clear wording of a statute controls over ambiguous legislative history,[12] especially when the better reading of the legislative history is the same as the literal wording of the statute, as discussed hereinafter. Moreover, the statutory scheme recognizes only two kinds of mobile services -- commercial and private, and it is logical that the definition of private mobile service (paragraph 3 of Section 332(d)) necessarily includes every mobile service that has not already been defined as a commercial mobile service in paragraph (1) of that subsection. That logic helps to resolve the possible ambiguity in the Conference Report, so as to include every mobile service that is not a commercial

---

10 *Notice* at ¶¶ 29-31.

11 *Notice* at ¶ 29.

12 See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). See also, *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980); Sutherland Statutory Construction, 5th ed. Vol. 2A, § 45.02, p. 5.

mobile service in addition to every commercial mobile service that is not a "functional equivalent" of a commercial mobile service.

The Commission has stated well the preferable interpretation of the Conference Report.[13] The example provided by the Conference Committee directly supports the Commission's first interpretation and is inconsistent with the Commission's second interpretation. The Commission correctly recognizes that the Conference Committee, in explaining how the definition is to work, has given "a specific example of a service meeting the literal definition of a commercial mobile service that nevertheless might not be functionally equivalent" and therefore would be a private mobile service.[14]

As the Commission also recognized, "[t]he Conference Report notes that the proposed House version of Section 332 defined private mobile service as 'anything that does not fall under commercial mobile service,' and that the proposed Senate definition was 'virtually identical'".[15] There is no indication that the Conference Committee meant to change this interpretation in including a "functionally equivalent" test as an alternative way for a mobile service provider to qualify as a private mobile service.[16] Indeed, the Conference Report's choice of a negative example -- of what is not "functionally equivalent" to a

---

13 *Notice* at ¶ 29-30.

14 *Notice* at ¶ 30.

15 *Notice* at ¶ 30 and n. 38.

16 *Notice* at ¶ 30.

commercial mobile service -- is persuasive evidence that the Conference Committee's purpose in adding the functionally equivalent test was to broaden rather than narrow the definition of private mobile service.

Conclusion

The Congress enacted a comprehensive reform of mobile service classifications, seeking parity among commercial mobile services while placing numerous for-profit mobile services providing interconnected service in the category of private mobile service. These comments advocate interpretations of definitions which are thought to be those intended by the Congress, serving the public interest, and recognized as reasonable by the Commission.

Respectfully submitted,

REED SMITH SHAW & MCCLAY

Judith St. Ledger-Roty
J. Laurent Scharff
Matthew J. Harthun
REED SMITH SHAW & McCLAY
1200 18th Street, N.W.
Washington, D.C. 20036

November 8, 1993

CERTIFICATE OF SERVICE

Pursuant to ¶ 82 of the Notice, courtesy copies of the foregoing Comments have been delivered to the following:

John Cimko, Jr.
Chief
Mobile Services Division
Common Carrier Bureau
1919 M Street, N.W.
Room 644
Washington, D.C. 20554

Richard J. Shiben
Chief
Land Mobile and Microwave Division
Private Radio Bureau
2025 M Street, N.W.
Room 5202
Washington, D.C. 20554